No. 99771-3

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON FOOD INDUSTRY ASSOCIATION and MAPLEBEAR, INC. d/b/a INSTACART,

Respondents,

vs.

THE CITY OF SEATTLE,

Appellant.

RESPONDENTS' ANSWER TO BRIEFS OF AMICI CURIAE STATE OF WASHINGTON, ASSOCIATION OF WASHINGTON CITIES, AND NATIONAL EMPLOYMENT LAW PROJECT ET AL.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Constitutional Provisions

Other Authorities

I. INTRODUCTION

The amicus briefs filed in support of the City of Seattle by the State of Washington ("State"), the Association of Washington Cities ("AWC"), and the National Employment Law Project and other workers' interest groups (together, "NELP"), rehash the City's meritless arguments and fixate on issues that are irrelevant or premature. It bears repeating that the trial court, in denying in part the City's CR 12(b)(6) motion, did not make a ruling on the merits; the court merely allowed Plaintiffs' well-pleaded claims to proceed to discovery. At the motion-to-dismiss stage, all allegations in a complaint must be accepted as true. Yet these amici uniformly—and mistakenly—take issue with the facts as pleaded, presuming a litigation posture far ahead of the current proceedings.

Making matters worse, these amici ignore and mischaracterize Plaintiffs' claims, rendering many of their arguments attacks on straw men. They rely on misplaced assertions about "home rule," general police powers, and

inapposite court decisions predicated on developed factual records. Amici's contentions fail to identify any error in the trial court's ruling, and in many instances underscore why the trial court was correct to deny the City's motion to dismiss as to whether the Ordinance exceeds the City's police powers and violates constitutional rights.

II. ARGUMENT

A. The State misreads RCW 82.84 and misapprehends Plaintiffs' constitutional claims.

The State advances several arguments concerning Plaintiffs' statutory and constitutional claims. These contentions largely rehash the arguments the City made for itself and are flawed for the same reasons Plaintiffs have already explained in their merits briefs.

Separation of powers. The State begins with the axiom that "separation of powers requires courts to defer to constitutional laws enacted by other branches of government." State Br. 3 (capitalization altered). No one disagrees with that principle, but it does little to aid the resolution of this appeal. It

is common ground that courts must uphold constitutional legislation and orders, and Plaintiffs do not contest that the standard of review on some of the claims here is deferential (though not a rubber stamp). The trial court's ruling recognized as much, *see* CP 491-94, and the State does not contend otherwise. Even so, the trial court correctly held that the complaint's allegations—taken as true, as they must be at this preliminary stage—state a claim that the Ordinance is unconstitutional even under a deferential standard. Needless to say, it does not violate separation-of-powers principles for a court to conclude that factual development is needed to determine whether an ordinance is constitutional.

Emergency powers. The State maintains that still further deference is necessary because "emergencies unlock additional powers." State Br. 7. To support that proposition, the State relies on a recent Ninth Circuit decision stating that during an emergency, the "leeway" the government ordinarily has to enact public health measures "is even greater." *Slidewaters*

LLC v. Wash. State Dep't of Lab. & Indus., 4 F.4th 747, 756, 758 (9th Cir. 2021), *cert. denied*, No. 21-849, 2022 WL 89400 (U.S. Jan. 10, 2022). But that citation begs the question whether this Ordinance was enacted to address a public health emergency at all, or whether—as Plaintiffs have pleaded—it was a political favor to special interests. The latter is not an exercise of police power and warrants no deference.

Slidewaters is inapposite for the further reason that it involved a challenge to emergency restrictions on business activities—in particular, the closure of a waterpark. Unlike the challenge in *Slidewaters*, this complaint does not take issue with "summary procedures" state agencies may invoke to protect public safety. 4 F.4th at 758. Nor does it second-guess the "governor's many discretionary actions to address the COVID-19 outbreak," such as decisions whether to release categories of prison inmates because of the danger the virus poses to them. *Colvin v. Inslee*, 195 Wn.2d 879, 898, 467 P.3d 953 (2020) (cited at State Br. 6).

Particularly when the challenged government action is pretextual and has no connection to public health, the existence of an emergency does not immunize local governments from constitutional scrutiny or judicial review. The dissenting Justices in *Colvin* recognized that "in times of crisis, the judiciary must not invoke separation of powers to avoid subjecting government actions to close scrutiny and accountability," *id.* at 903 (González, J., dissenting), and the majority did not disagree with that principle. Indeed, this axiom of constitutional law goes back well over a century to the U.S. Supreme Court's seminal decision in *Jacobson v. Massachusetts*, which upheld a compulsory vaccination law but recognized the "duty of the courts" to determine whether a "statute purporting to have been enacted to protect the public health" has "no real or substantial relation to [that] object[]." 197 U.S. 11, 31, 25 S. Ct. 358, 49 L. Ed. 643 (1905). Even though *Jacobson* arose in the context of an "ongoing smallpox pandemic," the Court "didn't seek to depart from normal legal

rules during a pandemic"; it applied the traditional rational basis standard. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70, 208 L. Ed. 2d 206 (2020) (Gorsuch, J., concurring); *see also* Institute for Justice Br. 10-25 (explaining that rational basis standard requires meaningful judicial review and often necessitates evidentiary development).

The trial court understood all this, acknowledging that the City holds "broad authority under police powers and authority made even broader by the exigencies of a pandemic," but still, "constitutional rights … cannot be infringed just because there's an emergency situation." CP 494. That observation was apt when the trial court made it in March 2021, and the passage of time only underscores its wisdom: The pandemic that hit our shores two years ago shows no signs of abating, and the City's public health emergency still has no end in sight.

Takings Clause. The State's arguments against the Takings Clause claim turn entirely on the question of whether

there is a protected property interest in FDNCs' contractual rights. *See* State Br. 21-24. But it is settled that the Takings Clause protects contractual rights, just as it protects other forms of intangible property. *See, e.g.*, *Lynch v. United States*, 292 U.S. 571, 579, 54 S. Ct. 840, 78 L. Ed. 1434 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States."). The State thus has no choice but to concede that, on at least some occasions, "contracts have been involved in takings claims." State Br. 22-23.

From there, the State's arguments repeatedly misapprehend the basis of Plaintiffs' takings claim. To be clear, this claim is not "based on a reduction in revenue," or the notion that the Ordinance merely "impair[s]" a contractual expectancy. State Br. 21-22. As explained—and as pleaded—the Ordinance effects a taking because it appropriates Instacart's (and other FDNCs') contract-based platforms and

conscripts them into providing subsidized services to the Seattle public. *See* CP 85-86.

Citing two cases where courts recognized that contractual rights can be taken, the State then suggests that contracts support a takings claim only in two "limited circumstances": when the contracts are "connected to physical property or completely acquired for public purpose." State Br. 23 (citing *Cienega Gardens v. United States*, 331 F.3d 1319, 1325 (Fed. Cir. 2003), and *Omnia Com. Co. v. United States*, 261 U.S. 502, 510, 43 S. Ct. 437, 67 L. Ed. 773 (1923)). But such "limitations" appear nowhere in those decisions. *Cienega Gardens* recognized a protected property interest "both in the subject matter of the contract (the real property rights) and in the contract itself," 331 F.3d at 1330, thus refuting the notion that contract rights count as property only when the contracts' subject matter concerns physical property. *Omnia*, for its part, recognized that the "contract in question was property within the meaning of the Fifth Amendment," 261 U.S. at 508, and

held that the "appropriation" of a contract for public use constitutes a taking, *id.* at 513, without requiring that the appropriation be "complete[]."

Indeed, to accept the State's assertion that a contract must be "completely acquired for public purpose" to state a takings claim, State Br. 22-23, would write the *Penn Central* test for regulatory takings out of the law. The *Penn Central* factors address "the extent to which the regulation has interfered with distinct investment-backed expectations," "[t]he economic impact of the regulation," and "the character of the governmental action"—questions of *nature* and *degree* that would be irrelevant if the State's understanding were sound. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978); *see also* Resp. Opening Br. 49-50. The State suggests that the Ordinance's economic impact is less than "substantial," State Br. 24, but that is plainly a disputed factual point that cannot be resolved on a CR 12(b)(6) motion, as illustrated by the State's citation of a

case where a jury trial was held on a law's economic impact. *See Colony Cove Props., LLC v. City of Carson*, 888 F. 3d 445, 447 (9th Cir. 2018).[1]

Contracts Clause. The State's arguments under the Contracts Clause are flawed on both the facts and the law. In contending that courts should not second-guess other branches because the judiciary lacks the "expertise to assess public health," State Br. 25 (quotation omitted), the State again presumes that the Ordinance's premium-pay requirement is actually about responding to a public health emergency, when that point is hotly contested. While application of the Contracts Clause "'must be accommodated to the inherent police power of the State,'" *id.* (quoting *Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410, 103 S. Ct. 697, 74 L.

[1] The State's reliance on two federal district court cases—*El Papel LLC v. Durkan*, No. 2:20-cv-01323, 2021 WL 4272323 (W.D. Wash. Sept. 15, 2021), and *Jevons v. Inslee*, ___ F. Supp. 3d ___, No. 1:20-cv-3182, 2021 WL 4443084 (E.D. Wash. Sept. 21, 2021)—is entirely misplaced, as the plaintiffs in those cases did not allege a regulatory taking.

Ed. 2d 569 (1983)), the mere *ipse dixit* that the City properly exercised its police powers is not sufficient. The Clause requires courts to test that assertion by examining whether a contractual impairment is in fact supported by "a legitimate public purpose"; that requirement, in turn, "guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Energy Rsrvs.*, 459 U.S. at 412.

The State maintains that there is no "substantial impairment" of a contractual relationship here because, in its view, the Ordinance merely imposes "labor standards" that operate in a field with a history of regulation. State Br. 27-28. But the Ordinance is no ordinary employment regulation. The State focuses on the Ordinance's premium-pay provision without addressing the provisions that freeze into place FDNCs' service areas and other operational decisions. *See* U.S. Chamber of Commerce ("Chamber") Br. 5-6 (noting the unique nature of the Ordinance and its impositions, which "are nothing like ordinary regulations of wages, hours, and working

conditions"). Nor do app-based food delivery platforms resemble the natural gas markets or any industry that courts have treated as so heavily regulated as to preclude the substantial impairment of contracts. *See, e.g.*, *Energy Rsrvs.*, 459 U.S. at 413. It strains credulity to assert that app-based platforms and the independent contractors who use them have historically been subject to heavy regulation, or that this Ordinance is anything but unprecedented. *Cf.* Press Release, Seattle City Council Passes First-In-The-Nation Hazard Pay Law for Gig Workers by Unanimous Vote!, Working Washington (June 15, 2020), https://tinyurl.com/yckjye8s.

The State also suggests that the Ordinance cannot substantially impair contractual rights because it does not "nullify[]" them. State Br. 28. But the case cited for that proposition says nothing about nullification; it just notes that "the extent to which the law … prevents the party from safeguarding or reinstating his rights" is pertinent to the impairment analysis. *Sveen v. Melin*, 138 S. Ct. 1815, 1822,

201 L. Ed. 2d 180 (2018). It is unclear why the State thinks that the Ordinance, which severely restricts FDNCs from taking any action in response to the costs the Ordinance imposes on them, permits the "safeguarding or reinstating" of the contractual rights it impairs. In any event, that is at most a factual dispute not capable of resolution in this case's current posture.

Unable to counter Plaintiffs' Takings Clause and Contracts Clause claims on their own terms, the State instead deflects, parroting an argument from the City that these two claims were improperly "combine[d]." State Br. 29. Not so. Those claims were pleaded as separate counts, the trial court analyzed them separately in denying the motion to dismiss, and this Court may do the same in resolving this appeal. The State's quarrel appears to be with the notion that a Takings Clause claim can be based on property in the form of a contractual right, but as already explained (*supra* 7), that is settled law. *See also* Resp. Opening Br. 50-51 (explaining that

it is commonplace for the same government measure to violate multiple constitutional provisions).

Statutory arguments. The State's arguments to narrow the ambit of the Keep Groceries Affordable Act, RCW 82.84, spring from the flawed premise that the Act should be construed with a "strong presumption against state preemption of local authority." State Br. 8. That presumption may apply to claims of implied or "field" preemption, but not so here where Plaintiffs contend that the Ordinance is "facially preempted" by a state statute that expressly limits local governments' authority. *Watson v. City of Seattle*, 189 Wn.2d 149, 158, 171, 401 P.3d 1 (2017). That question of facial preemption turns on the scope of RCW 82.84, a voter initiative this Court interprets "according to the general rules of statutory construction." *City of Spokane v. Taxpayers of City of Spokane*, 111 Wn.2d 91, 97, 758 P.2d 480 (1988). The City never invoked any presumption against preemption of local authority, and for good reason: The Act expressly provides that its preemptive provisions "are to be

construed liberally so as to effectuate their intent, policy, and purposes." RCW 82.84.050(2).

The State similarly errs in contending that RCW 82.84's application implicates the "heavy burden" that rests on parties contending that a local ordinance is unconstitutional. State Br. 8. Any presumption in favor of constitutionality is irrelevant to the application of RCW 82.84. Analyzing whether the Ordinance imposes or collects a tax, fee, or other assessment on groceries is not a challenge to the Ordinance's constitutionality that implicates that presumption. *See Cannabis Action Coal. v. City of Kent*, 183 Wn.2d 219, 226, 351 P.3d 151 (2015).

After engaging in these misguided attempts to place a thumb on the scale, the State turns to arguments about the initiative's title, codification, and "legislative history." The State's reluctance to confront the law's actual text is both telling and inconsistent with the Court's clear instruction: "Where the language of the initiative is clear and unambiguous,

a court may not look beyond the text of the measure ….” *Pierce Cnty. v. State*, 150 Wn.2d 422, 430, 78 P.3d 640 (2003). The State’s extratextual arguments are incapable of creating ambiguity when none otherwise exists, and they are unpersuasive in their own right.

As an initial matter, this Court has acknowledged that ballot titles can be “general,” and do not always “give the details contained in the bill.” *Wash. Fed’n of State Emps. v. State*, 127 Wn.2d 544, 555, 901 P.2d 1028, 1034 (1995). Regardless, as the State recognizes, the ballot title for Initiative 1634 said that the measure “would prohibit” not just “taxes” but also “fees” and “assessments.” State Br. 10. The State also ignores the emphasis in the voters’ pamphlet on the initiative’s goal to “keep[] the price of groceries as low as possible,” without regard to the form of the government measure that causes those prices to increase. CP 284; RCW 82.84.020(2). That aim, after all, is made plain by the title of the Act itself, expressing the People’s desire to “Keep Groceries Affordable.”

And while it is true that the Initiative's drafters directed that the Act be codified in Title 82 of the Revised Code, which is labeled "Excise Taxes," the Act's operative provisions make clear that it covers "any tax, fee, or other assessment on groceries," RCW 82.84.040(1), not just "excise tax[es]," RCW 82.84.030(5).

When it finally gets around to engaging with the Act's text, the State's arguments largely rehash the City's meritless contentions, to which Plaintiffs already responded at length in a Reply Brief that the State does not cite or otherwise acknowledge. The State does nothing to grapple with the fact that the Act preempts not just "tax[es]," but also "fee[s]" and "other assessments," or that it defines those terms to include not just "lev[ies]" but also "charge[s] or exaction[s] of any kind." RCW 82.84.040(1); *id.* 82.84.030(5). The State maintains that the Ordinance does not involve a "similar levy, charge, or exaction" under RCW 82.84.040. State Br. 13-16. But its

arguments rest on the mistaken premise that RCW 82.84 "is about taxes," State Br. 10, and nothing more.

The State, like the City, resists the ordinary meaning of the critical statutory terms. And as previously explained, the tax-only reading renders superfluous the definition's reference to "similar … charge[s] or exaction[s] of any kind." RCW 82.84.030(5); *see* Resp. Opening Br. 20-29; Resp. Reply Br. 3-17. And the State, like the City, misconstrues *Washington Association for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 644, 278 P.3d 632 (2012), which discussed the meaning of a "fee" in the context of a "license fee," not as an unmodified term. The point is that courts have distinguished "fees" from "taxes," *even where* "license fees," such as those in *Washington Association*, are remitted back to the government.

The State claims that Plaintiffs have taken cases "out of context" in defining "fee" broadly as "*any* charge that is imposed on businesses." State Br. 14-15. In the State's view,

those cases are distinguishable because the fees in those cases involved "regulatory fees that the State collected," whereas "the premiums here go directly to vulnerable workers, rather than being collected by a public entity in exchange for privileges or services." *Id.* at 15. This argument again fights the plain text of the statute. The Act does not ban "license fees," "regulatory fees," or any other type of modified fee. It bans "fee[s]" writ large, RCW 82.84.040(1), and both the ordinary meaning of that term and cases interpreting the word show that the premium-pay surcharge here is inarguably a fee. And in fact, the Act ensures the *broadest possible* understanding of the term by prohibiting "*any*" fee on groceries. RCW 82.84.040(1) (emphasis added). Like the City, the State never actually argues that the $2.50-per-delivery surcharge does not fit within the ordinary meaning of "fee," and that alone should resolve the issue.

The problems with the State's argument do not end there. The State takes issue with Plaintiffs' argument that a fee

reaches "*any* charge that is *imposed* on businesses" by pointing out that the Ordinance's premium-pay charge is not "collected by a public entity in exchange for privileges or services." State Br. 15 (second emphasis added). Yet again, the State is refusing to accept the words used in the statute. The Act prohibits a local government from "impos[ing] *or* collect[ing]" any fee on groceries. RCW 82.84.040(1) (emphasis added); *see* Resp. Reply Br. 14-17. The State's argument that a fee must be collected by the government ignores that the Act specifically banned governments from imposing a fee in the first place.

The State concludes by claiming that "there is no plausible argument that Seattle's Ordinance, which requires businesses to pay *their workers* hazard pay, is a tax or regulatory fee." State Br. 19. But the entire point of the Act is to bar local governments from enacting targeted measures—as distinguished from generally applicable wage or working condition regulations—that add to the cost of groceries, including grocery delivery. The City did not merely enact a

wage increase for grocery delivery workers; instead, it enacted an Ordinance specific to FDNCs that attaches a $2.50 surcharge to each "online order" of groceries in Seattle. CP 105. The City can no more attach a surcharge to grocery deliveries than it could direct grocery stores to add a dollar to the price of every loaf of bread that they sell, as long as the proceeds from that charge go to workers. Both are fees on groceries under the Act, not wage hikes, and both conflict with RCW 82.84's text as well as that law's purpose of keeping groceries affordable. *See* Northwest Grocery Ass'n ("NWGA") Br. 5-8 (explaining how the Ordinance makes groceries more expensive and "defies the intent of the voters and is harming [grocers] throughout" Seattle).

B. AWC's "home rule" arguments are misplaced and fail to justify dismissal of Plaintiffs' constitutional claims.

AWC declines to take a position on the Ordinance's validity, and purports only to "underscore" a concern that judicial review of local ordinances must be deferential. AWC

Br. 2. According to AWC, the need for deference flows from Washington's "home rule" doctrine.[2] But that doctrine is irrelevant to the issues on appeal.

First, neither home rule nor principles of deference to local authority have any application to Plaintiffs' arguments under RCW 82.84. That Act operates as an express limitation on any local government's ability to impose or collect any tax, fee, or other assessment on groceries. The scope of the Act presents a question of statutory interpretation, the answer to which does not upend the "status quo" of home rule in other contexts. AWC Br. 8.

With respect to Plaintiffs' other claims, AWC's home-rule arguments are likewise misguided. As a home rule municipality, the City may ordinarily exercise police powers even absent an express delegation from the State, but the

[2] The State likewise cites "home rule" to support its assertion that local governments may exercise broad police powers. State Br. 4-5.

exercise of those powers is nevertheless subject to certain limits. This is because "'a home rule city is subordinate to the legislature as to any matter upon which the legislature has acted.'" *Chem. Bank v. WPPSS.*, 99 Wn.2d 772, 793, 666 P.2d 329 (1983) (quoting Philip A. Trautman, *Legislative Control of Municipal Corporations in Washington*, 38 Wash. L. Rev. 743, 772 (1963)). "In the event of an inconsistency" between the state statute and city ordinance, "the statute prevails." *Id.* As already explained in Plaintiffs' briefs and by amicus NWGA, the Ordinance is expressly preempted by the plain terms of RCW 82.84, thus negating the presumption of home rule.

Nor does "home rule" give cities a free pass to commit constitutional violations or evade judicial review. A "home rule" city is one that "may exercise powers that do not violate a constitutional provision, legislative enactment, or the city's own charter." *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 560 n.2, 29 P.3d 709 (2001) (quotations omitted). As set forth in Article XI, Section 11 of the Washington Constitution: "Any

county, city, town or township may make and enforce *within its limits* all … local police, sanitary and other regulations *as are not in conflict with* general laws" (emphasis added).

In responding to Plaintiffs' constitutional claims, AWC again cites home rule to argue that a "highly deferential" standard of review is appropriate for local ordinances. AWC Br. 6. But AWC never disagrees that this standard is simply rational basis review—the same standard that governs Plaintiffs' claim that the Ordinance exceeds the City's police powers, and which the trial court expressly applied. *See* Resp. Opening Br. 32-42; CP 491-93.

In its own briefing, the City itself barely mentions home rule, likely because it understands that home rule merely addresses which level of government retains the authority to exercise police powers, as between the municipality and the state. Plaintiffs recognize that the City has a police power to legislate to protect public health and safety. The issue in this case is whether, crediting the allegations in Plaintiffs'

complaint, the City has exercised that power within constitutional and statutory bounds. Home rule says nothing about that.

C. NELP's focus on worker classification and reliance on flawed worker surveys and anecdotes are irrelevant to the legal sufficiency of Plaintiffs' complaint.

NELP begins its brief by claiming that "[t]he proper classification of Seattle's app-based delivery workers" as employees or independent contractors "is not at issue here." NELP Br. 1. But the rest of its brief tells a different story. Over and over, NELP cannot resist referring to "misclassification" or taking issue with the notion that shoppers who use Instacart and other app-based food delivery platforms may not qualify as employees. Those policy arguments are aimed at a broader issue well outside the scope of this appeal: whether "gig workers" are properly classified as independent contractors. *See* Chamber Br. 22. NELP's arguments about worker classification are thus irrelevant except to highlight that

the City's stated purpose for adopting the Ordinance is pretextual. If the City adopted the $2.50 per-delivery fee to circumvent the classification of food delivery workers as independent contractors, rather than as a response to a public health emergency, that only supports the disconnect between the Ordinance's actual and stated purposes.

The remainder of NELP's brief consists of survey findings and anecdotal accounts intended to paint a dire picture of the "gig economy." Because these assertions go well beyond the scope of facts pleaded in the complaint, they cannot demonstrate error in the trial court's denial of a motion to dismiss that complaint. Nor should this Court consider these "facts" in their own right. Not only is NELP's account drawn from self-selected surveys without any verification or other measures to ensure their reliability, but most of these reports concern the industry at large (not Instacart specifically) or detail conditions in other states and cities. *See also* Chamber Br. 21 (responding to NELP's "non-evidence-based-assertions").

To the limited extent NELP's anti-gig-economy broadside addresses matters relevant to this case, its assertions are frequently mistaken. For instance, NELP mentions concepts like "early-access" and "reliability incidents," *see* NELP Br. 18-19, but those references are entirely outdated—Instacart's platform no longer has such indicators. And contrary to the gloomy picture NELP paints with cherrypicked anecdotes, "the vast majority of workers participating in the gig economy describe the experience positively." Chamber Br. 15. Discovery is needed so that the parties can develop their competing positions on these points, and the trial court can resolve them with an evidentiary record. But in this case's current procedural posture, NELP's contentions cannot demonstrate that the Ordinance furthers public health and safety, as the City has claimed.

Meanwhile, NELP repeatedly emphasizes its support for the Ordinance based on concerns about working conditions that the Ordinance does not actually advance, all while ignoring the

facts alleged in the complaint about how Instacart has responded to the pandemic. For example, NELP expresses apprehension about the lack of personal protective equipment for app-based workers. NELP Br. 10, 16-17. But as Plaintiffs have explained, the Ordinance does not actually do anything to provide PPE—whereas Instacart was already voluntarily doing so, at no cost to shoppers, before the Ordinance even took effect. Resp. Opening Br. 9, 16, 29-30. Likewise, NELP recounts an anecdote of a worker who "can't self-quarantine because not working is not an option." NELP Br. 23. The Ordinance does nothing to solve this—but even before the Ordinance took effect, Instacart voluntarily guaranteed two weeks of sick pay for shoppers diagnosed with COVID-19. Resp. Opening Br. 9-10. Thus, NELP's examples only reinforce that the Ordinance does not reasonably address the public health concerns that the City used to justify it.

NELP's brief similarly pinpoints why the Ordinance violates the Equal Protection Clause. The brief repeatedly

refers to problems gig workers experience while ignoring that the Ordinance targets only FDNCs and not TNCs, a distinction that lacks any rational basis and was motivated by pretext. *See* Resp. Opening Br. 61-66. For instance, NELP quotes a New York City-focused survey that found that "app-based gig workers are twice as likely as workers who did not engage in app-based gig work to have contracted COVID-19." NELP Br. 22 (quoting Irene Lew et al., *The Gig is Up: An Overview of New York City's App-based Gig Workforce during COVID-19* 18, Cmty. Serv. Soc'y (July 2021), https://tinyurl.com/4azzu6mf). But that study counted drivers from TNCs "such as Uber or Lyft" among the cohort of "app-based gig workers." *See* Lew, *supra*, at 27. And while NELP repeatedly voices concerns about low hourly pay, lack of benefits, and supposedly insufficient protection from exposure to COVID-19, NELP never claims that any of these issues are unique to FDNCs and do not apply to TNC drivers. The NELP brief thus demonstrates that there is no "basis in reality for the

distinction between" TNCs and FDNCs, which is why the Ordinance's classification lacks a rational basis. *State v. Osman*, 157 Wn.2d 474, 486, 139 P.3d 334 (2006).

III. CONCLUSION

For these reasons and those stated in Plaintiffs' opening and reply briefs, as well as those set forth in the amicus briefs of the Chamber, Institute for Justice, and the NWGA, this Court should reverse the trial court's decision dismissing Plaintiffs' claim that RCW 82.84 preempts the Ordinance and should affirm the trial court's decision denying the City's motion to dismiss Plaintiffs' constitutional claims.

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RESPECTFULLY SUBMITTED this 20th Day of January, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing brief to be served on counsel for all other parties in this matter via this Court's e-filing platform.

Dated January 20, 2022.

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